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E. ROBERT SEAVER

SUPPLEMENTAL APPENDIX OF UNREPORTED CASES REFERRED TO IN APPELLANT'S BRIEF

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 169

STEPHEN RADICH,

Appellant,

—v.—

PEOPLE OF THE STATE OF NEW YORK,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT FILED MAY 18, 1970
PROBABLE JURISDICTION NOTED OCTOBER 19, 1970

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 328—September Term, 1970.

(Argued November 12, 1970 Decided December 24, 1970.)

Docket No. 35287

LONG ISLAND VIETNAM MORATORIUM COMMITTEE, NASSAU COUNCIL OF WOMEN STRIKE FOR PEACE, BARBARA SPADANUTA, MAE NEWBURGER, RHODA SEIDEL, and BARBARA SHACK,

Plaintiffs-Appellees,

—v.—

WILLIAM CAHN, District Attorney, Nassau County,

Defendant-Appellant.

Before:

LUMBARD, *Chief Judge,*
WATERMAN and ANDERSON, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Eastern District of New York, sitting as a three-judge court convened pursuant to 28 U.S.C. §§2281 and 2284, declaring §136(a) of New York's General Business Law constitutional as properly applied, but holding that it did not apply to appellees' emblem which consists of a circular representation of the American flag upon which the peace symbol is superimposed.

Affirmed on the ground that §136(a) is unconstitutional.

BURT NEUBORNE, New York Civil Liberties Union (David Orlin and Wade Hooker, on the brief), *for appellees.*

STEVEN M. HOCHBERG, Deputy Assistant Attorney General (Louis J. Lefkowitz, Attorney General of the State of New York and Samuel A. Hirshowitz, on the brief), *for appellant.*

LUMBARD, *Chief Judge*:

This is an appeal from a judgment of the Eastern District of New York, sitting as a three-judge court convened pursuant to 28 U.S.C. §§2281 and 2284 which declared §136(a) of the General Business Law of New York constitutional as properly applied, but held that it did not apply to plaintiffs' emblem—a representation of the American flag on which is superimposed a symbol that resembles an inverted trident and is generally recognized as the traditional peace symbol.

Section 136(a) provides that it shall be a misdemeanor to display "any word, figure, mark, picture, design, drawing, or any advertisement" upon any "flag, standard, color, shield, or ensign of the United States of America."[1] The statutes defines "flag," as used in this section to include

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1 Section 136(a) provides in full:

§136. *Exhibition or display of the flag*

Any person who: a. In any manner, for exhibition or display, shall place or cause to be placed, any word, figure, mark, picture, design, drawing, or any advertisement, of any nature upon any flag, standard, color, shield or ensign of the United States of America, or the state of New York, or shall expose or cause to be exposed to public view any such flag, standard, color, shield or ensign, upon which after the first day of September, nineteen hundred and five, shall have been printed, painted or otherwise placed, or to

"any flag, standard, color, shield or ensign, or any picture or representation, of either thereof, made of any substance, or represented on any substance, and of any size, evidently purporting to be, either of, said flag, standard, color, shield or ensign, of the United States of America, or of the state of New York, or a picture or a representation of either thereof, upon which shall be shown the colors, the stars, and the stripes, in any number of either thereof, or by which the person seeing the same, without deliberation may believe the same to represent the flag, colors, standard, shield or ensign of the United States of America or of the state of New York."

We hold that §136(a) is unconstitutional both on its face and as applied in this case.

On January 15, 1970, defendant William Cahn, the District Attorney of Nassau County, announced at a press conference that he would, on complaint of any person, prosecute under §136(a) anyone displaying or distributing a representation of the American flag which has superimposed upon it any symbol, design, or word. He specifically mentioned as violative of the statute the emblem widely circulated by the plaintiff organizations and the individual plaintiffs in the form of a decal and a button.

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which shall be attached, appended, affixed or annexed, any word, figure, mark, picture, design, or drawing, or any advertisement of any nature

* * * * *

Shall be guilty of a misdemeanor.

Other subsections of the statute are specifically directed at physical uses of the flag, as defined in the section, which tend to "cast contempt upon" the American flag. §136(d) and (f). The statute also prohibits raffling or placing in pawn any such flag or representation thereof §136(e), as well as public use of it as a receptacle for depositing or collecting money §136(g).

That emblem consists of a circular representation of the American flag, having seven stars in the upper left-hand corner and eleven stripes and colored red, white and blue, upon which the peace symbol is superimposed. (See Appendix.)

On January 19, plaintiffs obtained from Chief Judge Mishler an order directing D.A. Cahn to show why he should not be enjoined from carrying out his announced intention to prosecute those wearing plaintiffs' buttons and to show cause why a three-judge court should not be convened to determine plaintiffs' challenge to the constitutionality of §136(a). The action was based on the Civil Rights Act, 42 U.S.C. §1983. At this time Cahn promised that he would refrain from commencing prosecutions during the pendency of the federal proceedings. On January 27, Judge Bartels ordered the convocation of a three-judge court; that court consisted of Circuit Judge Moore, and District Judges Bartels and Travia.

On June 22, 1970, the district court issued its decision declaring §136(a) constitutional as properly applied, but holding that it could not be applied to plaintiffs' emblem since that emblem did not constitute a flag. Judge Moore, writing for himself and Judge Bartels, stated that plaintiffs' emblem did not come within the proscription of §136(a) because "[i]t is the flag itself which the statute seeks to protect from physical alteration, and no attempt to alter an actual American flag is presented by the plaintiffs' buttons and decals." In reaching the decision, Judge Moore concluded that the New York Legislature in enacting §136 could not possibly have intended that the statute should apply to the wearing or distribution of such emblems as those of the plaintiffs. Judge Travia, concurring in part and dissenting in part, agreed with the majority that

the statute was constitutional, but believed that it clearly proscribed plaintiffs' emblem and that such a proscription was justified by the state's interest in protecting the integrity of the flag.

Since Cahn had pledged to respect the district court's decision pending appeal, that court issued no injunctive relief. Accordingly, Cahn appealed to us pursuant to the newly enunciated rule of *Mitchell* v. *Donovan*, 398 U.S. 427 (1970), in which the Supreme Court held that an order granting or denying only a declaratory judgment must be appealed to the Court of Appeals rather than to the Supreme Court. We affirm the district court's decision on the ground that §136(a) is unconstitutional.

The first contention which appellant Cahn urges is that the district court should have abstained from deciding the case since it found §136(a) susceptible of an interpretation which avoids the constitutional question. According to this argument, since the constitutional question can be avoided and hence the only question is one of statutory interpretation, the state courts—which have not yet interpreted §136(a)—should have the first opportunity to interpret their own statute. In support of this contention, Cahn relies on *Harrison* v. *N.A.A.C.P.*, 360 U.S. 167, 176 (1959), in which the Supreme Court observed that

> "no principle has found more consistent or clear expression than that the federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded a reasonable opportunity to pass upon them."

Cahn also argues that giving the state courts the first chance to interpret §136(a) would cause no irreparable harm to the plaintiffs since he has promised to refrain

from instituting prosecutions during the pendency of this case and would surely do the same if the district court applied the abstention doctrine and the plaintiffs promptly instituted an action in the state courts.

We reject these contentions as did all three judges below. The principle of abstention does not involve the abdication of federal jurisdiction, but only the postponement of its exercise. *Harrison* v. *N.A.A.C.P., supra,* at 177. However, in cases involving a challenge that the statute is on its face unconstitutional, the delay of state court proceedings might itself cause an impermissible chilling of the very constitutional rights which the plaintiff seeks to protect. *Zwickler* v. *Koota,* 398 U.S. 241 (1967); *Dombrowski* v. *Pfister,* 380 U.S. 479, 483-85 (1964). The Supreme Court has stated that "due respect" must be afforded a civil rights plaintiff's choice of forum for the vindication of his First Amendment rights, *Zwickler* v. *Koota, supra,* at 247-8; and we stated in *Holmes* v. *New York City Housing Authority,* 398 F.2d 262, 266 (2d Cir. 1968), that "[w]here a district judge chooses to exercise his equitable discretion in favor of retaining [a civil rights action], it will be unusual indeed when an appellate court refuses to uphold his discretion."

In the circumstances of this case, abstention could cause irreparable harm to the plaintiffs and to others similarly situated and could thus effectively nullify First Amendment rights. This danger is particularly grave since state proceedings often take many months before they are finished. Moreover, we were advised at oral argument that others are now being arrested frequently for various types of violations of §136(a) similar to those in the instant case or are being threatened with arrest for such violations. For example, counsel for the plaintiffs advised us at argument that they represent over sixty persons who have been

charged with displaying the emblem in question here, and that these prosecutions and District Attorney Cahn's threat have deterred many people from joining plaintiff organizations. Although Cahn has promised to refrain from prosecutions during the pendency of this litigation, his promise hardly affects prosecutions in parts of the state other than Nassau County. As Judge Moore observed in his opinion for the district court, "our citizens are entitled not to be threatened with prosecution because of a particular interpretation given to a somewhat ambiguous statute by a prosecutor whose views on public issues may differ from others." In view of these circumstances, there is no good reason why the federal courts should abstain in this §1983 civil rights suit until the state courts have resolved the questions. In the First Amendment area where many persons are constrained to withhold action until their rights are clarified, it is particularly desirable that judicial action be expeditious.

In any event, §136(a) cannot reasonably be interpreted to be inapplicable to the emblem in question here and thus to avoid the constitutional question.

The district court found that §136(a), while constitutional, does not apply to plaintiffs' emblem. We cannot agree with this finding. Despite Judge Moore's attempt to look at the purpose of the statute, the language of §136(a) clearly includes emblems such as those displayed by plaintiffs, as well as many others. Section 136(a) makes criminal the display of any flag, standard, color, shield, or ensign upon which shall have been placed any word, figure, mark, picture, design, or drawing; and the statute defines the words "flag, standard, color, shield or ensign" to include a picture or representation thereof upon which shall be shown the stars and stripes in any number or "by which

the person, seeing the same, without deliberation may believe the same to represent" the American flag or colors.

In our opinion anyone looking at the plaintiffs' emblems, with their red, white, and blue stars and stripes, must conclude immediately that they are representations of the flag. Although the courts should try, whenever possible, to construe statutes to avoid a constitutional infirmity, they may not, in doing so, rewrite the statute or do violence to its plain language. *Welsh* v. *United States*, 398 U.S. 333, 344-45 (1970) (Harlan, *J.*, concurring). Judge Moore's interpretation of §136(a) seems to us to be rewriting the plain language of the section. For this reason we must reach the constitutional question.

Plaintiffs' first argument in this regard is that §136(a) is unconstitutional on its face because it is overbroad and that it is overbroad because traditional First Amendment activity may be swept within its ambit. We agree. The Supreme Court has indicated on several occasions that if there is a reading of a penal statute which authorizes local law enforcement officers to prosecute traditional First Amendment activity, such a statute is unconstitutionally overbroad, despite the fact that the statute may also purport to proscribe activity not entitled to constitutional protection. E.g. *Cox* v. *Louisiana*, 379 U.S. 536 (1965); *Edward* v. *South Carolina*, 372 U.S. 229 (1963); *Winters* v. *New York*, 333 U.S. 507 (1948); *Baggett* v. *Bullett*, 377 U.S. 360, 371 (1964); *Keyishian* v. *Board of Regents*, 385 U.S. 589, 609 (1967). Section 136(a) falls in this category of overbroad statutes.

As plaintiffs argue, §136(a) prohibits in clear language a myriad of uses of the flag, including not only the displaying of the emblems which plaintiffs have been distributing, but also the displaying of flags or flag-type buttons

with patriotic slogans or pictures on them. It prohibits on its face all kinds of posters, buttons, symbols, slogans, and emblems such as have been used for many years in election campaigns, patriotic movements, and so forth.[2] Judge Moore recognized this problem when he wrote:

> The district attorney's broad reading of the subsection would make criminal the possession of all those reproductions of the face of President John F. Kennedy superimposed upon a picture of the American flag which hang on the walls of shops, homes and offices all over this country. And what of the millions of celluloid campaign buttons which for generations, including the time before this statute was enacted, have carried the photographs of the aspiring Presidential and other candidates against a background of one or more American flags in full color?

Thus the broad range of §136(a) would prohibit respectful and customary use of emblems, using the flag, or the signs and colors of the flag which are recognized as representations of the flag, although the emblems are used to espouse ideas—a communicative activity which is protected by the First Amendment. In *Street* v. *New York*, 394 U.S. 576 (1969), the Supreme Court held that verbal communication involving the flag is protected by the First Amendment, even if that verbal communication "casts contempt upon" the flag. The question in the instant case is whether nonverbal or visual communication involving the flag and flag alteration is similarly protected.

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2 As the Appendix to plaintiffs-Appellees' brief demonstrates, the American flag has been traditionally utilized as a campaign poster, a military recruiting poster, and an eye-catching backdrop for the effective transmission of ideas.

In *Stromberg* v. *California*, 283 U.S. 359 (1931), the Supreme Court held that display of a political emblem—there a red flag as a sign of opposition to organized government—is communicative activity protected by the First Amendment. The Court reaffirmed that position last year in *Tinker* v. *Des Moines*, 393 U.S. 503 (1969), where it held that nonverbal display of political emblems—such as arm bands—was "akin to pure speech" and was entitled to the same degree of constitutional protection. The many types of flag usage and flag alteration mentioned above and prohibited by §136(a) are a similar means of nonverbal political communication and hence come within the same rule. The use of the American flag throughout our history and in almost every political campaign as an aid in the dissemination of ideas demonstrates beyond any doubt the protected nature of such forms of expression.

Of course "symbolic speech" or visual communicative activity has been subjected to a greater degree of state control than has verbal communication. *United States* v. *O'Brien*, 391 U.S. 367 (1968); *Radich* v. *New York*, 26 N.Y. 2d 114 (1970), prob. jur. noted —— U.S. ——, 39 U.S.L.W. 3167 (October 19, 1970). The protection of such nonverbal communication is not absolute, but may be limited by a valid state interest. With respect to the flag uses described above, however, the state has no valid interest in prohibiting them. In *Street* v. *New York*, *supra*, Mr. Justice Harlan reviewed the state interests which a flag statute could conceivably serve. He listed

> "(1) an interest in deterring appellant from vocally inciting others to commit unlawful acts; (2) an interest in preventing appellant from uttering words so inflammatory that they would provoke others to retaliate physically against him, thereby causing a breach

of the peace; (3) an interest in protecting the sensibilities of passers-by who might be shocked by appellant's words about the American flag; and (4) an interest in assuring that appellant, regardless of the impact of his words upon others, showed proper respect for our national emblem." 394 U.S. at 591.

Section 136(a) was not meant to prohibit incitement of onlookers to unlawful acts, a purpose which did motivate the enactment of the flag mutilation and defilement provisions of subsections (d) and (f). See *Radich* v. *New York*, 26 N.Y.2d 114, 124 (1970). Nor would subsection (a) withstand constitutional inquiry if construed as an attempt to proscribe expression having a tendency to provoke violent retaliation, for its proscription is not narrowly drawn to punish only that expression which would incite the average citizen to violent retaliation. See *Street* v. *New York, supra* at 592. Mr. Justice Harlan gave short shrift to the third possible state interest—that of protecting the sensibilities of passers-by—when he stated:

> "It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."

Street v. *New York, supra*, at 592. Finally, after careful analysis of *West Virginia* v. *Barnette*, 319 U.S. 624 (1943) (ruling that compulsory flag salutes violate freedom of speech and religion), Mr. Justice Harlan dismissed the state's interest in ensuring proper respect for the integrity of the flag. Such an interest, while wholesome on its face, has no place in a free society when, as in §136(a), it in effect requires worship of the flag by compelling a series of

taboos concerning flag display. Thus, in the absence of any valid state interest in prohibiting them, the many flag uses and flag alterations which §136(a) proscribes are protected by the First Amendment and cannot constitutionally be forbidden. From this fact the overbreadth argument follows *a fortiori*.[3]

Similarly, §136(a) is unconstitutional as applied to the particular flag alteration engaged in by the plaintiffs here. Like the respectful and "patriotic" flag uses discussed above, plaintiffs' flag usage is a means of expressing their views on a vital political issue and hence is protected communicative activity unless there is a valid state interest in proscribing their emblem. But as shown above, the state has no such interest. Consequently, we conclude that §136(a) violates the plaintiffs' First Amendment right to freedom of speech.

Plaintiffs also argue that §136(a) is unconstitutional on its face because it fails to provide enforcement officials adequate guidance concerning what is proscribed. We agree. Because of its overbreadth, the statute vests local law enforcement officers with too much arbitrary discretion in determining whether or not a certain emblem is grounds for prosecution. It permits only that expression which local officials will tolerate; for example, it permits local officials to prosecute peace demonstrators but to allow "patriotic" organizations and political candidates to go unprosecuted. This is apparently the kind of toleration the defendant has practiced. This opportunity for discriminatory selective enforcement, which §136(a) provides, renders the statute unconstitutional. *Cox* v. *Louisiana*, 379

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3 Cf. *Crosson* v. *Silver*, —— F. Supp. —— (D. Ariz. Nov. 13, 1970), in which a three-judge district court declared Arizona's flag desecration law unconstitutionally overbroad.

U.S. 536, 557 (1965); *Thornhill* v. *Alabama*, 310 U.S. 88, 97-98 (1940).

Finally, §136(a) is unconstitutional because it fails to afford adequate notice to the public of the scope of its proscription and is thus void for vagueness. As plaintiffs colorfully state in their brief on appeal:

> "Most persons react to Section 136(a) of New York's General Business Law in a manner similar to that of the Court below. They read the statute; painfully arrive at the plain, albeit convoluted, meaning of its words; and exclaim 'It can't possibly mean what it says.' They then attempt, as did the Court below, to arrive at some alternative meaning. Unfortunately, however, no two persons arrive at the same 'alternative meaning.' The net result is that no one knows what the statute means."

Absent knowledge of what the statute actually proscribes, a layman might refrain from conduct that is protected by the First Amendment for fear of coming too close to the line. Hence, the statute's failure to afford adequate notice of the scope of its proscription adds another constitutional infirmity. See *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939).

For these reasons, we affirm the judgment of the district court that the plaintiffs may not be criminally prosecuted for displaying their emblem, since we find that §136(a) of New York's General Business Law is unconstitutional.

APPENDIX

Opinion of the United States District Court

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

No. Civil 70-79 Tucson

SHARON CROSSON,

Plaintiff,

vs.

ROSE SILVER, County Attorney, Pima County, Arizona,

Defendant.

Before Ely, Circuit Judge, and Walsh and Craig, District Judges.

WALSH, D.J.

Plaintiff brought this action pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201-02 seeking declaratory relief and an injunction restraining defendant from further criminal proceedings against plaintiff under the Arizona flag desecration statute, A.R.S. § 41-793(C) (1956). This three-judge court was convened since the requests for relief meet the criteria of 28 U.S.C. §§ 2281 et seq. Our jurisdiction is founded on 28 U.S.C. § 1343(3) and (4).

From the statement of facts stipulated by counsel, it appears that on June 2, 1970, defendant filed in the Superior Court of the State of Arizona in and for the County

ima an amended information[1] charging that on or
t May 6, 1970,

Sharon K. Crosson did, by her act of burning a flag
f the United States of America, wilfully, unlawfully,
nd publicly mutilate, deface, defile or cast contempt
pon said flag, all in violation of A.R.S. § 41-793 C.

on 41-793(C) reads in pertinent part:

A person who publicly mutilates, defaces, defiles,
ramples upon, or by word or act casts contempt upon
flag is guilty of a misdemeanor . . . .

ection (D) of Section 41-793 defines "flag" as including

ny flag, standard, color, ensign or shield, or any copy,
icture or representation thereof, made of any sub-
tance or of any size, purporting to be the flag, stand-
rd, color, ensign or shield of the United States or of
his state.

tiff entered a plea of not guilty and moved to quash
nformation. This motion was denied.
the trial,[2] defendant intends to prove that on May
70, on the University of Arizona campus, plaintiff
ely burned or aided and abetted the public burning
United States flag, and that the burning was done with
t to cast contempt upon the flag. The contemptuous

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he initial pleading by the state in Superior Court was a
t" information filed May 19, 1970, charging that Mrs. Crosson
nowingly and publicly mutilate, deface, defile, trample upon,
word or act cast contempt upon a flag all in violation of
. § 41-793."

fendant has agreed to defer prosecution in the state court
ng a decision by this court.

intent will be shown by testimony that concurrently with the burning plaintiff made remarks of a derogatory nature directed at the flag and the foreign policy of the United States with respect to the Southeast Asia military involvement. Defendant will not, however, seek a conviction on the basis of any of plaintiff's remarks but only for the act of flag burning.

In this court, plaintiff has moved for summary judgment asking that we declare A.R.S. § 41-793(C) violative of the First and Fourteenth Amendments. Specifically, plaintiff's attack charges the statute is overbroad in that it impermissibly infringes on protected expression and, further, it uses terminology so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.

Defendant has moved to dismiss or in the alternative asks this court to abstain from passing on the statute's constitutionality. Defendant argues that if the statute is not constitutionally perfect, its vices are minor and clearly within the reach of an acceptable limiting construction readily to be anticipated as a result of the state criminal prosecution.

For the reasons set out below, we find A.R.S. § 41-793(C) unconstitutional.

The controlling precedent on the issues before this court is *United States* v. *O'Brien*, 391 U.S. 367 (1968). Prior to analyzing these issues in light of the *O'Brien* formula, however, we must decide something *O'Brien* assumed, namely, whether the conduct drawn into question by the subject statute is conduct "so intertwined with expression" as to bring the First Amendment into play. See *Cowgill* v. *California*, 396 U.S. 371 (1970) (Harlan, J., concurring). Plain-

tiff asserts, and we agree, that her act of publicly burning the flag was symbolic speech.

While we need not here determine whether all conduct intended to express an idea is symbolic speech, we think it is self-evident that most, if not all, conduct associated with the United States flag is symbolic speech. Such conduct is normally engaged in with the intent to express some idea. Further, such conduct is invariably successful in communicating the idea. There is nothing equivocal about a flag-draped casket or a flag flying at half-mast at the death of a dignitary. Nor in this day and time is anyone likely to mistake the nature of the ideas expressed by a young person who desecrates his country's flag at an anti-war gathering.

There is, then, a recognizable expressive element in conduct prohibited by A.R.S. § 41-793(C). Accordingly, such conduct is prima facie protected by the First Amendment and the statute must be scrutinized to determine whether its regulation of the conduct is constitutionally permissible. The method of scrutiny is that directed by *O'Brien*.

In *O'Brien* the Court noted that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." 391 U.S. at 376. Whether the regulation in question properly effects the interest depends on whether

> it is within the constitutional power of the Government . . . it furthers an important or substantial governmental interest . . . the governmental interest is unrelated to the suppression of free expression . . . the incidental restriction on alleged First Amendment

freedoms is no greater than is essential to the furtherance of that interest. 391 U.S. at 377.

The only state power this court perceives as a constitutional basis for a penal statute of the type here involved is the police power. We specifically reject the existence of a constitutionally recognized state power to prohibit flag desecration based on an interest in preserving loyalty or patriotism. *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624 (1943). But cf., *United States* v. *Ferguson*, 302 F. Supp. 1111 (N.D. Cal. 1969). Whether the statute with which we are here concerned is a proper exercise of the police power necessitates an analysis of the statute to determine if it satisfies the last three *O'Brien* criteria.

Having decided that flag desecration can be symbolic speech, we must now determine what are the speech and nonspeech elements in such conduct in order to decide whether there is an important or substantial governmental interest in regulating the nonspeech element. The speech element is the readily recognizable expression of discontent with something the flag symbolizes. The nonspeech element in an act of flag desecration is the physical act of desecration.[3] What governmental interest, then, could there be in regulating this element?

When accomplished in public, this nonspeech element of flag desecration has a dual impact. The first impact is on the flag itself: it is mutilated, destroyed, or otherwise desecrated. The second impact is on the viewers: the emotions they experience, approval, disapproval, or even indifference, at the sight of the flag being desecrated. Since

[3] We use the term "desecration" in this opinion in its broadest sense; i.e., encompassing acts touching and not touching the flag, and acts more or less offensive.

these two "impacts" can fairly be characterized as part and parcel of the nonspeech element of public flag desecration, a statute prohibiting such behavior must be justified by virtue of a finding that there is a substantial or important governmental interest in preventing one or both "impacts."

We note the listing in *Street* v. *New York*, 394 U.S. 576, 591 (1969), of the possible governmental interests which could be furthered by a prohibition against casting contempt on the flag "by word." The characterization and disposition by *Street* of these interests is helpful, though not dispositive, since we are not prepared to say that there is no difference between the "impact" of pure speech on the listener and the "impact" on the viewer of the nonspeech element of symbolic speech. See Note, *Freedom of Speech and Symbolic Conduct: The Crime of Flag Desecration*, 12 Ariz. L. Rev. 72, 77 (1970).

We find that the State has no property interest in the flag sufficient to support a prohibition against the first "impact"; i.e., physical desecration of the flag. And we read *Street* as holding that the State cannot justify such a prohibition in order to insure that the potential desecrator shows proper respect for the flag. 394 U.S. at 593.

Insofar as the second "impact" is concerned, we must decide whether there is some governmental interest connected with the reactions of viewers of an act of flag desecration. We find nothing inherent in the act which stimulates those viewers who sympathize with the aims of the desecrator to engage in unlawful acts, such as rioting. Nor is the protection of the "sensibilities of passersby" the proper concern of the State. On neither score is there a substantial or important governmental interest furthered by a prohibition based on the second "impact."

This court cannot say, however, that the state legislature could not validly find that certain types of public flag desecration are so inherently inflammatory that in and of themselves they are likely to provoke the average person to retaliation and thereby cause a breach of the peace. *Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942). Just as the flag is a symbol to the desecrator, representing perhaps oppression, hypocrisy, ill-conceived military ventures, or whatever, so is it a symbol to many Americans of a love as strong as love of self, that of love of country. We think it is within the realm of legislative judgment to find that some types of public flag desecration will be as provocative to many viewers as the kind of personal insult which is often followed by violence. That the state has a substantial interest in preventing the resulting breach of the peace and that the police power is the proper foundation for legislation directed toward that end is well settled doctrine.

It is also clear that in line with the third *O'Brien* criterion the state interest in preventing breaches of the peace is, in the flag desecration context, unrelated to the suppression of free expression. The interest is affected, not by the speech element of the conduct, but by the second "impact" of the nonspeech element. To more clearly differentiate, the symbolic expression of the idea originating in the mind of the desecrator does not carry the "impact" which per se causes the breach of the peace. Rather it is the previously described second "impact" of the nonspeech element which causes the breach and affects the state's interest. The state in order to further its interest may reach out to the cause of the breach and prohibit it. Since in this context the cause is not protected expression, it is clear that the state interest underlying the prohibition is not related to the suppression of free expression.

Thus far we have discussed in general terms a state's prohibition of public flag desecration. Having identified a power on which such a prohibition can be based and a state interest which could justify the exercise of the power, and having determined that interest to be unrelated to suppression of free expression, we must examine the statute in question here to determine whether its method of prohibiting public flag desecration places no greater burden on protected expression than is necessary to further the state's interest in preventing breaches of the peace. In other words, is A.R.S. § 41-793(C) drawn so as to include within its prohibition only those types of flag desecration which per se are likely to cause breaches of the peace or does it include non-provocative yet protected-because-symbolic types.

The statute first prohibits "publicly" desecrating the flag. Some such limitation is necessary if it is to be said the state is protecting against breaches of the peace. In this context, however, "publicly" would have to be construed to include only those situations where any member of the public could attend, specifically one who might react violently.

The remainder of the statute, however, is not susceptible to any limiting construction. On the contrary, its reach is altogether clear when it penalizes a person who publicly "mutilates, defaces, defiles, tramples upon, or by word or act casts contempt upon a flag . . . ."[4]

Assuming, but not deciding, that the terms mutilate, deface, defile, and trample upon are specific enough to connote only acts which when performed upon an actual

[4] We examine this statute as though the "by word" provision were not included. We consider this phrase already excised by *Street* v. *New York, supra.*

United States flag are likely to provoke retaliation from the average person, we cannot find that a prohibition of any "act [which] casts contempt" includes only acts the doing of which the legislature may validly prohibit. When the plain meaning of contempt is considered in light of the immense variety of conduct by which human beings express themselves, it becomes clear that acts casting contempt upon the flag could range from the obscene to the innocuous. While it may be true that some acts are more contemptuous than others, "contempt" is not itself a word of degree but is all-encompassing. It would describe such acts as sticking out one's tongue, turning one's thumbs downward, or raising a clenched fist salute. Rather than provoke the average person to retaliate violently, these acts would likely merit no more than a scornful glance.

The "contempt" portion of § 41-793(C) would prohibit the doing of all such acts. Yet these acts, which are clearly symbolic speech, do not affect the only legitimate state interest underlying such a prohibition. Even assuming there are acts of contempt which, when directed toward the flag, are inherently inflammatory, the prohibition against "acts [which] cast contempt" by its terms proscribes substantially more than is necessary to protect the state's interest; and that which is unnecessarily proscribed includes protected symbolic speech. Since we cannot see that any limiting construction short of excision can cure the defect,[5] this portion of § 41-793(C) must be struck down as unconstitutionally overbroad. *Thornhill* v. *Alabama*, 310 U.S. 88 (1940).

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[5] See *Harrison* v. *NAACP*, 360 U.S. 167 (1959). It will not suffice that the state may decline to prosecute relatively trivial acts of contempt. The hazard of prosecution and consequent chilling effect remains. *Baggett* v. *Bullitt*, 377 U.S. 360, 373 (1964).

It may be argued that the statute is disjunctive and thus severable, and that we should approve the "mutilate, deface, defile, or trample upon" portion. However, we find that these terms, when juxtaposed against the definition of "flag" in § 41-793(D), lose whatever susceptibility to a properly narrow application they may have had standing alone.

It is clear that when a person places on his automobile windshield a flag decal with a peace sign superimposed thereon, he has, in his effort at symbolically expressing his conception of what the flag should stand for, also "defaced" a "representation . . . purporting to be the flag . . . of the United States . . . ." Such an act violates § 41-793(C) and exposes the actor to criminal punishment. Yet we cannot conceive that such an act is likely to provoke the average citizen to angry retaliation.[6]

Thus, we must conclude that this portion of A.R.S. § 41-793(C) also prohibits protected acts of symbolic speech which do not affect the state's interest in preventing breaches of the peace. This being so, the only action we may take is to strike down the entire statute as unconstitutionally overbroad, *Thornhill* v. *Alabama,* supra; *Hodsdon* v. *Buckson,* 310 F. Supp. 528 (D. Del. 1970); Note, 83 Harv. L. Rev. 844, 853-55 (1970), leaving to the legisla-

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[6] In view of our limited finding that it is the sight of the flag being desecrated in certain ways that is likely to provoke retaliation, we must question the inclusion in § 41-793(D) of "standard, color, ensign or shield" as items which when desecrated are likely to provoke retaliation. We cannot say that conduct associated with these objects would, if communication is intended, necessarily constitute symbolic speech. By the same token, we cannot say that they are of such symbolic significance to the average person that a breach of the peace would likely result from their public desecration. We do not, however, pass on the question whether the state flag has such significance or whether the state might have some interest, property or other, in protecting its flag.

ture the enactment of a statute which properly protects the state's interest in preventing breaches of the peace.[7]

We decline to issue the injunction requested by plaintiff, without prejudice to her right to renew the request if need be. We do anticipate that the state through its officer, defendant here, will discontinue prosecution in light of our opinion. See *Hodsdon* v. *Buckson*, supra.

DATED: November 13, 1970.

(illegible) ELY
United States Circuit Judge

JAMES A. WALSH
United States District Judge

(illegible) CRAIG
United States District Judge

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[7] We would caution, however, that inclusion of a specific prohibition against desecration by burning might raise a question of specificity. "Burn", unlike, for example, "defile", does not describe an act which is invariably offensive and thus cannot have the same per se effect on which a "breach of the peace flag desecration prohibition" must be founded.

This does not mean that a public flag burner cannot be prosecuted under traditional breach of the peace statutes where, for example, the words accompanying the burning raise the entire act to the status of provocation.

Opinion of Supreme Court of the State of Washington

IN THE

SUPREME COURT

OF THE STATE OF WASHINGTON

No. 40096

EN BANC

Filed September 3, 1970

THE STATE OF WASHINGTON,

Respondent,

v.

FLOYD WAYNE TURNER, JR.,

Appellant.

Found guilty by a jury of violating the Uniform Flag Law (Laws of 1919, ch. 107, p. 259; RCW 9.86), defendant appeals the sentence of 6 months in jail and a $500 fine. The statute then in effect declared:

> No person shall publicly mutilate, deface, defile, defy, trample upon or by word or act cast contempt upon any such flag, standard, color, ensign or shield.

Uniform Flag Law, RCW 9.86.030.[1]

[1] In 1969, the legislature changed the flag law to read:

> No person shall knowingly cast contempt upon any flag, standard, color, ensign or shield, as defined in RCW 9.86.010,

The amended information charged that the defendant, on May 12, 1967:

> did willfully and unlawfully and directly and indirectly aid, abet, assist, counsel, encourage, advise and induce another to publicly mutilate, deface, defile and defy a flag of the United States of America, and publicly, by word or act cast contempt upon said flag by doing the following acts, to-wit: *holding a flag of the United States of America while another set fire to and destroyed said flag by burning.* (Italics ours.)

Defendant's arrest stemmed from a report to Seattle police by Mr. Louis C. Scott, a Seattle apartment house manager, who testified that about 6 p.m., May 12, 1967, some of his tenants complained about noise from across the street and wanted to know "what I was going to do about the noise out there." The noise, he said, came from the headquarters of what was known as CAMP, or Central Area Motivation Project. CAMP is an organization having to do with the social and economic rehabilitation of a large economically depressed area in Seattle's central district. From his apartment window, Mr. Scott had seen a number of people gradually assemble in the yard fronting the CAMP headquarters building. He said some carried baskets of what he thought was food, and others had musical instruments. He thought "the people who assembled there in large numbers dressed differently than normally." He heard music from inside the CAMP building and saw someone passing out yellow balloons to children in the yard.

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by publicly mutilating, defacing, defiling, burning, or trampling upon said flag, standard, color, ensign or shield.

Laws of 1969, 1st Ex. Ses., ch. 110, p. 823.

The enactment adds the word *knowingly*, eliminates the words *by word* and explicitly prohibits a public burning of the flag.

ceed the defendant because, as he said, "he was the rson in the group who carried a flag."
t 10:30, a curious thing happened. He said:

ed pickup truck came in and brought a piano, an right piano, parked it right in front of my window, t a little bit south of it. And there several men came l unloaded it on the ground, carried it across the eet to this CAMP Center, carried it up the stairs, the first three steps there. Carried that piano up se steps and right up here on the sidewalk. Then y proceeded to knock that piano apart. Q. Did y use anything to do this? A. There appeared to I rather think from the way the men swung, pos- ly a couple of sledgehammers and probably axes, s what they used to knock the piano apart. Q. Was ompletely knocked apart? A. Yes. Each time they the piano everyone would yell. The splinters were ng and it made quite a din there. Q. Did the de- dant take part in the destruction of this piano? No, I didn't notice him doing that.

e from the piano smashing induced Mr. Scott to call ice again, and they arrived to observe the piano being loaded and hauled away. After that, Mr. bserved the event for which the defendant was l. Looking through his binoculars, he saw the de- hold an American flag while another individual fire:

t after a little bit then the two men moved together l the defendant held the flag while this other gentle- n lit it with a lighter and he held the flag until it rned. And when it got hot enough and the heat in-

tense enough, he dropped it. He pushed it away and it lit towards the other man's feet. Q. You mean the defendant dropped it? A. Yes.

Several Seattle police officers corroborated Mr. Scott's testimony in part, saying that they had seen Turner carrying an American flag that evening; other officers said that later in the week they had heard defendant say he had burned an American flag and would repeat the act at a later time.

Since the record does not show what was said before or after the flag burning, the defendant's actual intent, design or purpose in holding the flag while another set fire to it can only be inferred or guessed at.

Defendant, taking the stand in his defense, denied that he held a flag while another set fire to it; he denied that he participated in any way in a flag burning. He said he had been actively working in Seattle for several civil rights organizations which he described by their capitalized first letters as "CORE, NACP (sic) and SNICK." He was not, he said, a member of these organizations but sympathized with their aims and intended to help them. CORE, he said, meant Congress of Racial Equality, which stood for civil rights. He said the same about NAACP, National Association for the Advancement of Colored People. He was, he said, a helper of an organization whose purpose was to bring an end to war, called "The Committee to End the War in Vietnam," for which he had passed out leaflets and whose parade and demonstrations he had joined. He named a number of other groups and organizations which he had tried to help. He said he was a Dukhobor.[2] Interpreting some Russian writing on the back of his jacket which the

[2] A religious sect of Russian origin.

e's witnesses had referred to, defendant said it said khobor;" he explained that he had been raised a Du- bor and had learned to speak Russian and Chinese be- e many of the Dukhobors do not speak English. He fied that he was present in the yard of the CAMP ter on May 12th.

e left the CAMP area with others, he said, in a pickup et the piano. When he returned, he did notice that eone was carrying an American flag. He said he was aware that anyone had burned a flag there until a d later told him he had heard on the radio that some- by the name of Turner had been arrested for burning merican flag. That, he said, was the first he'd heard of lag burning at the CAMP Center. He testified that he r had a flag in his hand at the gathering that night. ross-examination, he said that, because policemen later wed him around and, as he expressed it, were harass- him, he mentioned that he might burn a flag but had r said he had burned one and was simply making con- ation. Defendant estimated the crowd as consisting pproximately 50 people—25 in a circle in the yard and remainder on the porch.

efendant makes eight assignments of error, but we need uss only one because it evokes the major and determina- issue of the appeal. The assignment arises from his ption to instruction No. 8 which said:

> You are instructed that it is not required that you find that the defendant intended to violate the law. You are only required to find that the defendant performed the physical act charged.

he question raised by the challenge to this instruction hether intent to desecrate the flag, as distinguished a mere intent to do the physical acts charged, is an ent of the crime defined by the Uniform Flag Law,

RCW 9.86.030. If intent to defile, deface and mutilate the flag, or intent to cast contempt upon it by the commission of the acts charged, *i.e.*, publicly burning or aiding in the public burning, must be proved, then the conviction cannot stand. If, however, the flag statute as then in effect. RCW 9.86.030, belonged to that class of statutes defining crimes mala prohibita rather than mala in se, then the judgment should be affirmed. *Seattle* v. *Gordon*, 54 Wn.2d 516, 342 P.2d 604 (1959); *State* v. *Lindberg*, 125 Wash. 51, 215 P. 41 (1923).

Although the legislature and the state's political subdivisions under the police power may in some circumstances declare certain acts, conduct or omissions criminal without regard to the intent or knowledge of the actor, guilty knowledge will be deemed an essential ingredient if the defined crimes involve moral turpitude. 22 C.J.S. *Criminal* Law § 30 (1961). This distinction is seen in the innumerable ordinances, statutes and resolutions which define crimes mala prohibita. Legislation prohibiting offenses mala prohibita, if properly enacted within the police power, is usually upheld and conviction sustained without proof of evil intent or in some instances without proof even of an intent to violate them. Many penal laws, for example, relating to pure food and drugs, labeling, weights and measures, building, plumbing and electrical codes, fire protection, air and water pollution, sanitation, highway safety and numerous other areas, in the exercise of the police power may be phrased and enforced as laws mala prohibita and may require neither proof of intent to do a wrong nor knowledge that the wrong will be done.

But as we read the flag desecration statute applied either to a principal or to one who aids and abets in its violation, it does not define crimes mala prohibita but rather offenses

mala in se. In essence, to defile or hold up to contempt is conduct involving moral turpitude. Therefore, to sustain a conviction of desecrating the flag as defined by that statute, the acts must have been done knowingly and intentionally with an intent or purpose of defiling and desecrating it or holding it publicly up to contempt.

Our conclusion that the flag desecration statute under consideration, Uniform Flag Law, Laws of 1919, ch. 107, p. 259; RCW 9.86.030, was one defining crimes mala in se as distinguished from those mala prohibita, is, we think, supported in part by the absence of any provision in the statute that to be actionable the prohibited acts must be done with intention to or under circumstances tending to provoke public disturbance, disorder, breach of the peace or riot. The offense does not, therefore, include conduct amounting to provocation or incitement to or advocacy of crime, violence, riot or public disorder. *See Brandenburg* v. *Ohio,* 395 U.S. 444, 23 L. Ed. 2d 430, 89 S. Ct. 1827 (1969). Nor does prosecution of defendant Turner in this case evoke the freedom of speech protection of the First Amendment, and the judicially sustained emergency limitation of that protection in circumstances of clear and present danger (*Schenck* v. *United States,* 249 U.S. 47, 63 L. Ed. 470, 39 S. Ct. 247 (1919); *Frohwerk* v. *United States,* 249 U.S. 204, 63 L. Ed. 561, 39 S. Ct. 249 (1919); *Debs* v. *United States,* 249 U.S. 211, 63 L. Ed. 566, 39 S. Ct. 252 (1919)), and the limitation upon the limitation which Mr. Justice Holmes said ought be applied to the clear and present danger doctrine. *See* dissent to *Abrams* v. *United States,* 250 U.S. 616, 624, 63 L. Ed. 1173, 40 S. Ct. 17 (1919). *Cf., Street* v. *New York,* 394 U.S. 576, 22 L. Ed. 2d 572, 89 S. Ct. 1354 (1969), where the court reversed a New York flag desecration conviction because it could not ascertain from

the record whether the accused had been found guilty of what he said or of what he did.

The statute in question does, as we have noted, employ language implying that some evil intent or purpose must be shown. Words such as deface, defile, defy or cast contempt upon strongly imply that the described conduct shall be held criminally actionable only when the interdicted conduct is done with an evil design or purpose. If this were not so, the legislature could readily have said otherwise.

The idea that there must be an intent to desecrate and hold up to contempt is supported by an absence until quite recently of national legislation on the subject. In 1968, the Congress broadened the application of an existing District of Columbia statute into a national law. Public Law 90-381, § 1; 82 Stat. 291; 18 U.S.C. § 700 (1968). This statute, unlike that under inquiry here (RCW 9.86.030), makes it a criminal offense *knowingly* to cast contempt upon the flag either by publicly mutilating, defacing, defiling, burning or trampling upon it.[3]

Similarly, the recent flag desecration legislation in this state requires that one *knowingly* and publicly cast contempt upon the flag to be guilty. Laws of 1969, 1st Ex. Ses., ch. 110, p. 823; RCW 9.86.030, as amended (n. 1, *ante*, at 1). Thus, the legislature and the Congress in amendatory legislation supplied in words what we think was earlier implied in law—the requisite element of intent or purpose publicly to desecrate, defile and hold up to contempt and that the intent or purpose with which the acts are done is for the jury to determine.

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[3] "(a) Whoever knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it shall be fined not more than $1,000 or imprisoned for not more than one year, or both." 18 U.S.C., § 700(a) (1968).

That preservation of our democratic institutions and onstitutional government does not depend upon reading ut all elements of design, purpose and intent from the Jniform Flag Law may be seen in a history of the operaion of the flag statute of modern Germany. The presence r absence of criminal intent seems to have had little effect ne way or the other in the preservation of life and liberty nd the pursuit of happiness in that country. Throughout ll stages of its modern career, there was in effect in Gerany a flag desecration statute. From an autocratic Imerial Germany under the Kaiser into the democratic Veimar Republic and thence into the unspeakably cruel nd ruthless dictatorship of the Third Reich regime of Hitler, succeeded in turn by the military government of llied occupation and control, followed then by the present emocratic Federal Republic of Germany—there was in he criminal code a flag desecration statute in force. *See* Appendix.

Accordingly, unless the statute expressly eliminates the lement of intent or design or defines the kinds of offenses hich, by their very nature, are classified judicially as mala prohibita, the ingredients of intent, design and purose should be deemed indispensable to a proof of guilt. To hold otherwise, would make anyone criminally liable who accidentally burned or walked upon the flag in public or unintentionally or accidentally committed some other act toward it which, if intent were present, would clearly constitute a defacing or defilement or a holding up to contempt.

Accordingly, the accused should be allowed to show the jury that, whatever acts may have been proved against him, his purpose in committing the acts was neither to deface, nor to defile, nor to desecrate, nor to cast contempt upon the flag and that his want of such evil intentions would

be a defense to the charge. He should be permitted also to prove accident, mistake or fortuitous circumstances in defense. Thus, the defendant should have been allowed on his plea of not guilty to show to the jury that the holding of an American flag while another set fire to it was done, if done at all, without any intent to degrade, desecrate, defile or cast contempt upon it. Instruction No. 8, declaring to the exact contrary, that intent to violate the law was immaterial and that the defendant would be guilty if he performed the physical acts charged regardless of his intent or purpose, was, therefore, reversible error.

True, the intent with which acts are done frequently lies hidden in the mind of the actor and may be ascertained only from his conduct and its surrounding circumstances, but the accused's state of mind remains an issue of fact to be inferred by the jury where intent, purpose and design are elements of the crime charged. The state, to sustain a conviction, is obliged, we think, to prove that the burning of the flag in public, or the aiding or abetting of it, was done with an intent or design or purpose to defile, or defy, or cast contempt upon the flag and in the absence of such an intent, design or purpose the crime has not been shown.

The cause is, therefore, reversed and remanded for a new trial.

HALE, J.

WE CONCUR:

HUNTER, C. J.

FINLEY, J.

ROSELLINI, J.

HAMILTON, J.

NEILL, J.

MCGOVERN, J.

APPENDIX

The Kaiser's flag desecration statute read:

> Any one who maliciously removes, destroys, injures, or commits insulting mischief on a public emblem of the authority of the Empire, or of a federal sovereign, or an emblem of the majesty of a federal state, shall be punished by a fine up to 600 shillings, or by imprisonment with labour up to two years.

G. Drage, Criminal Code of the German Empire § 135 (Novella of 1876), at 223 (1885). Another section in the German Criminal Code buttressed this one, making it a crime to commit insulting mischief on a public emblem or flag of a foreign state.

> Any one who maliciously takes away, destroys, injures, or commits insulting mischief on a public emblem of the authority of a state, which does not belong to the German Empire, or an emblem of the majesty of such a state, shall be punished by a fine up to 600 shillings, or by imprisonment with labour up to two years.

G. Drage, Criminal Code of the German Empire § 103 *a* (Novella of 1876), at 213 (1885).

One should not overlook the possible trespasses upon freedom of speech arising from the two statutes side by side. But even in autocratic Imperial Germany, unlike the statute at issue here, the law required that to be criminally actionable the acts be done with malice. Malice in Germany, circa 1871, one could assume to be the legal equivalent of malice in the United States, circa 1969, that is, acts

done with an ill will, or a design to effect an evil or unlawful purpose.

A 1932 amendment made substantial changes:

> Whoever publicly profanes (beschimpft) the Reich or one of the states incorporated into it, its constitution, colors or flag, or the German armed forces, or maliciously and with premeditation exposes them to contempt, shall be punished by imprisonment.

United States War Department Pamphlet No. 31-122, Military Government Information Guide, Statutory Criminal Law of Germany § 134*a*, at 95 (August, 1946) (enacted December 19, 1932; RGB1-I, 548). Significantly, this section is codified under "Profane Acts against the German Reich —*Beschimpfungen des Reiches und der Länder.*"

In 1935, after the Hitler regime established its dictatorship, the German flag desecration statute was, in a separate section, broadened to cover profanation of the swastika and other banners and symbols of the Nazi party in the following language:

> Whoever publicly profanes the German National Socialist Labor Party, its subdivisions, symbols, standards and banners, its insignia or decorations or maliciously and with premeditation exposes them to contempt shall be punished by imprisonment.
>
> The offense shall be prosecuted only upon order of the Reichsminister of Justice who shall issue such order in agreement with the Führer's deputy.

United States War Department Pamphlet No. 31-122, *supra*, at 96, as enacted June 28, 1935.

The Allied Control Council for Germany, which assumed governmental power as an act of occupation following the

defeat of the Third Reich in World War II, in Law No. 11 (Control Council for Germany, Law No. 11, Arts. 1 & 4, United States War Department Pamphlet No. 31-122, *supra*), repealed the section pertaining to the swastika and other Nazi symbols.

Time seems to have come full circle then, for in 1951, the Federal Republic of Germany, emerging from World War II and the apparent demise of Nazism, enacted section 96 as follows:

> 1. Anybody who publicly, in an assembly or by dissemination of writings, phonographic recordings, pictures or exhibits,
>
> (1) defames or maliciously vilifies the Federal Republic of Germany, one of her States, or the constitutional order,
>
> (2) urges or casts disparagement upon their colors, flags, coats-of-arms, or national anthems, shall be punished by imprisonment.
>
> 2. Equally punished shall be anybody who removes, destroys, injures or disfigures, or causes disparaging mischief to any publicly displayed national flag or any officially and publicly displayed insignia of sovereignty of the Federal Republic of Germany or one of her States. The attempt is punishable.
>
> 3. If the perpetrator has committed the deeds named in paras. 1 and 2 with the intent of furthering efforts designed to impair the existence of the Federal Republic or the constitutional principles designated in § 88, the punishment shall be imprisonment for a term of not less than three months. [8-30-1951].

G. Mueller and T. Buergenthal, German Penal Code of 1871 § 96, Defamation of the State, at 60 (1961).